ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION III

CA07-870

March 12, 2008

MARY JONES
APPELLANT

v.

CITIBANK SOUTH DAKOTA, N.A.
APPELLEE

AN APPEAL FROM GARLAND COUNTY CIRCUIT COURT
[No. CV-05-909-2]

HONORABLE VICKI S. COOK, JUDGE

REVERSED and REMANDED

Mary Jones has appealed from a judgment entered against her in an action filed by CitiBank South Dakota, N.A., on a delinquent credit-card account. We agree with Jones that this case must be reversed on the basis of the federal Truth in Lending Act, and we remand.

CitiBank sued Jones for a debt on a MasterCard account. Jones responded that CitiBank had failed to establish that they had an agreement or that she had received credit from CitiBank. She also raised the defense of estoppel, arguing that she had raised a dispute under the Fair Credit Billing Act and that CitiBank had failed to verify this account. Before trial, Jones filed proposed jury instructions explaining CitiBank's burden under the Truth in Lending Act to show that the charges were authorized.

At trial, CitiBank produced copies of Jones's statements and her checks given in payment. Ramona Chavez, through whose testimony the exhibits were admitted, testified that Jones never contacted CitiBank about a dispute. She admitted that CitiBank had no document signed by Jones authorizing any of the charges nor Jones's application for the credit card. CitiBank then argued that, because neither fraud nor unauthorized use had been pled, this line of inquiry was inappropriate. Jones responded that CitiBank had not met its burden of proving that Jones made any of the charges. The trial court ruled for CitiBank, stating that this was an affirmative defense that had to be specifically pled. Ms. Chavez then said that the cardholder has a responsibility to make sure that statements are accurate and to bring errors to CitiBank's attention. Over Jones's objection that the law does not impose this burden on the cardholder, the trial court permitted this testimony.

Jones admitted receiving statements and making payments but said that she had no idea if she had made these charges. Her attorney moved for directed verdict on the ground that the law does not require a credit-card holder to review her statements. The court denied the motion, ruling that the defense of unauthorized use was an affirmative defense under Ark. R. Civ. P. 8. The court stated that, because Jones failed to plead unauthorized use, it would not submit any jury instructions dealing with that defense. Jones proffered jury instructions based on the Truth in Lending Act. After a verdict for CitiBank, the court entered judgment against Jones, who filed this appeal.

Jones argues that the trial court erred (1) in permitting Ms. Chavez to testify; (2) in admitting the business records into evidence; (3) in refusing to permit her attorney to question Ms. Chavez about whether CitiBank could prove that the charges were authorized; (4) in

allowing Ms. Chavez to testify that Jones had a duty to inspect her statements; (5) in denying her motion for directed verdict; (6) in refusing to give her Truth-in-Lending-Act jury instructions; and (7) in allowing CitiBank's attorney to argue that Jones was obligated to review the statements. We need not decide the first two issues because this case must be reversed and remanded on the basis of the Truth in Lending Act. We address the remaining arguments together.

We agree with Jones that the trial court erred in not permitting her attorney to question Ms. Chavez about whether CitiBank could show that the disputed charges were authorized. Even if this was an affirmative defense, which we do not decide, Jones adequately raised it. In her answer, she recounted the lack of verification of the charges and cited the Fair Credit Billing Act, which amended the Truth in Lending Act.

The Truth In Lending Act provides in 15 U.S.C.S. § 1643(b) that, in an action by a card issuer to enforce liability for use of the card, the burden of proof is on the issuer to show that the use was authorized. *See Crestar Bank v. Cheevers*, 744 A.2d 1043 (D.C. App. 2000). If a cardholder denies or cannot ascertain whether the charges on the card are hers, she may put the card issuer to its proof that the charges were authorized. *Id.*

In *Danner v. Discover Bank*, 99 Ark. App. 71, ___ S.W.3d ___ (2007), we held that the bank's account records, a history of prior payment, and an absence of a timely objection to the charges are not enough to infer an authorization of the charges without impermissibly shifting the burden of proof to the cardholder. We explained:

> The Fair Credit Billing Act, 15 U.S.C. § 1666, amended the Truth In Lending Act for the express purpose of protecting the consumer against unfair and inaccurate credit card practices, and it is to be liberally construed in favor of the consumer. *Crestar*

> *Bank v. Cheevers*, 744 A.2d 1043 (D.C. Cir. 2000). Section 1643(b) places upon the card issuer the burden of proving that any disputed use made of the card was authorized. *See id*. Appellee failed to do so in the case at bar, relying instead on its own records that reflect an account and debt that it attributes to appellant, and by evidence that appellant made a few payments on the account before requesting validation of the debt. However, the *Crestar Bank* court held that no ratification or presumption of authorization will be inferred if the cardholder fails to object to charges within a reasonable time, even if those charges were not made by the cardholder, because to do so would impermissibly shift the burden of proof imposed by § 1643(b).
>
> We think this reasoning is sound and that, pursuant to the rule enunciated in *Crestar Bank*, the trial court erroneously shifted the burden of proof and appellee failed to show that the disputed charges were authorized. Here, there was no evidence to verify appellee's statements of accounts. It would, for example, have been possible to prove that the "Discover Card Telemarketing Sale" by which the account was opened was in fact made to appellant's home, or that appellant had executed a credit application, a cardholder agreement, or sales slips in connection with the disputed account so as to identify appellant as the cardholder and the charges as authorized. *See* 15 U.S.C. § 1643. Consequently, we reverse.

Danner v. Discover Bank, 99 Ark. App. at 72–73, ___ S.W.3d at ___.

In *Cavalry SPV, LLC v. Anderson*, 99 Ark. App. 309, 313–14, ___ S.W.3d ___ (2007), we followed *Danner* and explained that charge slips are not required, as a matter of law, to prove authorized charges:

> We clearly did not hold that sales slips were the sole means of proving authorized charges; in fact, we recognized that there might be other avenues of proof. Moreover, even with the modicum of information supplied by the card issuer in *Danner*, we remanded for a new trial because "we cannot say here that the record affirmatively shows that there could be no recovery." *Id*.

CitiBank, therefore, failed to prove its case. However, as in *Danner*, we do not dismiss. It has long been the rule that, where there is a simple failure of proof, justice requires that the court remand the case to allow the appellee the opportunity to supply the defect. Only where the record affirmatively shows that there can be no recovery on retrial should the case be

dismissed in the appellate court. *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1983); *Danner*, 99 Ark. App. at 73, ___ S.W.3d at ___.

Reversed and remanded.

GRIFFEN and VAUGHT, JJ., agree.